United States Court of Appeals

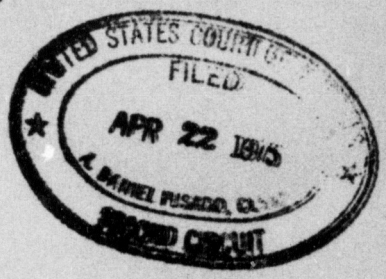
for the Second Circuit

APPELLANT'S BRIEF

75-7066

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT



ROBERT ST. AMOUR,
Plaintiff — Appellee

JOSEPH STONE,
Intervening Plaintiff — Appellee

v.

PAUL PHILBROOK, individually and as Commissioner of the Vermont Department of Social Welfare,
Defendant — Appellant

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P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

Civil Action No. 73 - 104

BRIEF OF DEFENDANT — APPELLANT

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I. STATEMENT OF THE ISSUES

A. Should the single-judge District Court have requested the convening of a three-judge court rather than rule on the merits of this case in which the plaintiff sought to enjoin on constitutional grounds the operation of a statewide regulatory scheme of the Vermont Department of Social Welfare?

B. Is the regulatory scheme, which does not permit a hearing prior to the denial of an application for General Assistance benefits, unconstitutional with respect to those persons who receive such benefits on at least three occasions during a thirty day period?

II. STATEMENT OF THE CASE

A. Nature of the case, course of proceedings, and disposition below.

This is a civil rights class action brought pursuant to the provisions of 42 U.S.C. §1983. The complaint on behalf of Robert St. Amour was filed on April 10, 1973, alleging that Defendant Paul Philbrook, Commissioner of the Vermont Department of Social Welfare, violated plaintiff's rights to due process under the 14th Amendment for interrupting his receipt of General Assistance benefits without first affording him adequate notice and an opportunity for a hearing to contest the reasons for such interruption. Both declaratory and injunctive relief were sought. Plaintiff accompanied the complaint with an application to Judge Coffrin for a temporary restraining order, but none was granted.

On November 7, 1973, Joseph Stone filed a motion to intervene, as well as an application for a TRO. The motion and application were granted on November 13th by Judge Holden.

On February 26, 1974, Plaintiff-Intervenor Stone moved for summary judgment. On March 4th, the parties filed a stipulation of dismissal as to Plaintiff St. Amour. A hearing on the motion for summary judgment was held before Judge Coffrin on May 2nd, at which time the defendant also moved for summary judgment. The case was taken under advisement.

On June 28, 1974, plaintiff filed a motion for class action certification. On October 7th, defendant moved to dismiss on the grounds of mootness. On that date, a hearing was conducted by Judge Coffrin on both motions.

The Court's opinion and order were filed on December 16, 1974. The defendant's motion to dismiss was denied. The plaintiff's motion for class action certification was granted(with respect to those individuals receiving General Assistance three or more times per month) as was his motion for summary judgment. The Court declared unconstitutional the State's policy of denying evidentiary hearings to such regular recipients of General Assistance prior to the termination of their benefits.

Defendant's notice of appeal was filed on January 14, 1975. On February 5th, defendant filed in the District Court a motion for relief from the Court's Order on the ground that the Court lacked subject matter jurisdiction because a three-judge court should have been convened. A hearing on this motion was held on February 18th. The motion was denied.

B. The facts.

1. The General Assistance program.

This case deals with Vermont's General Assistance (GA) program, which is a program designed to meet emergency needs. It is authorized by 33 V.S.A. §3001, et. seq, and is funded wholly by State monies[1].

"General Assistance" is defined as "financial aid to provide the necessities of life, including food, clothing, shelter, fuel, electricity, medical care and other items as the commissioner may prescribe by regulation when a need is found to exist and the applicant is otherwise found eligible." §3001(4). It shall be provided by the Department of Social Welfare to an eligible person "with due regard to the income, resources and maintenance available to him," and "[a]s far as funds are available ... shall provide a reasonable subsistence compatible with decency and health." §3003. An individual is eligible "if he is in need and unable to provide a subsistence for himself or is unable to secure a subsistence from a person legally responsible for his support." §3004(a). For all those receiving GA, however, the Department is required to take "all reasonable means to correct any propensity towards illeness," assuming the recipient is "able to work." §3050.

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[1]For fiscal year 1975, the program was funded at approximately $2,000,000. Because of unanticipated demands, it was necessary to obtain a supplemental appropriation of $173,000 in March, 1975, despite the fact that food grants are only at 80% of need, while rent grants are at 87%. It is anticipated that the program will still run at a deficit. For the four month period, November, 1974, through February, 1975, approximately 3,000 applicants per month were served by the program.

Moreover, the Department is authorized to recover the amount expended whenever a recipient "thereafter acquires real or personal property or an interest therein, or becomes employed ..." §3075.

The statutes are implemented through Department regulations which are set forth in the Welfare Assistance Manual, §2600, et. seq. These regulations reflect the intent of the statute to provide only limited emergency assistance. (See affidavit of Paul Philbrook, Appendix, at 46.) For example, in order to be eligible, persons must "actively pursue all potential sources of income ...," must have "an emergency need," and must "have exhausted all available income and resources." §2600(3), (4), and (5). (Appendix, at 80.) In addition, assistance is generally provided under the program for a period of only one week or less[2].

This being the case, individuals are required to reapply for each week in which they wish to receive GA; and for each reapplication there is an independent determination of eligibility. The eligibility criteria mentioned above must be met each time an individual applies. (Affidavit of Paul Philbrook, Appendix, at 46).

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[2]The following sections of the Welfare Assistance Manual show that assistance is available for a maximum of one week: §2607.1 (able-bodied applicants must seek work for 20 hours during seven-day period immediately preceding application as an additional condition of eligibility; Appendix, at 82),§2611 (allowances for grocery and personal needs shall, with certain exceptions, be issued for period of from one to seven days; Appendix, at 84), §2613.1 (room rent may be authorized for a period not to exceed one week; Appendix, at 85), §2613.2 (payments for temporary housing may be issued for periods of not more than 7 days; Appendix, at 87), §2613.3 (amount of fuel shall be limited to a one week supply; Appendix, at 88), and §2614 (allowances for restaurant meals and room and board shall be authorized for periods of from one to seven days; Appendix, at 89).

In addition, for all applications after the initial one, the individual must show that his income during the preceding 30 days is below the applicable standard of the federal-state Aid to Needy Families with Children program (§§2600(1), 2602(3); Appendix, at 80, 81) and that he has complied with the work-seeking requirements, if applicable. (§§2600(6), 2602(3), 2607.1; Appendix, at 80, 81, 82). Thus, there is no presumption of continuing eligibility. In fact, this is stated explicitly in §2142.4 of the Manual: "General Assistance, a program to meet emergency needs, has no provision for ongoing assistance. Subsequent requests will be treated as new applications." (Appendix, at 79.)

Despite the limited nature of the program, and the weekly reapplication-redetermination process, there are certain individuals who do in fact qualify for General Assistance on a recurring basis. In a stipulation filed by the parties (Appendix, at 58), based on Department surveys (See affidavit of Vasili Bellini, Appendix, at 51), it was agreed that between one-fifth and one-quarter of the GA caseload receives assistance three or more times per month.

Persons whose applications are denied are provided with an opportunity for a hearing under 3 V.S.A. §3091 to contest the validity of the decision. Benefits are not provided pending the decision, however. The hearing is identical to that provided to those individuals whose applications for benefits under one of the federal-state categorical programs are denied. It should also be pointed out that a denial one week does not affect subsequent applications.

2. Plaintiff Joseph Stone[3]

As stated in the affidavit of Andrew Leader, (Appendix, at 48), Joseph Stone was a recipient of GA for approximately eight months, with a five week interruption during a hospitalization. During most of this period, he was awaiting a determination on his two applications for assistance under the categorical Aid to the Disabled (AD) program. He initially received GA on March 23, 1973, and submitted an AD application on April 4th. This application was denied on July 27th. He filed a second AD application on August 13th, which was denied on October 16th. He reapplied for GA each week during this period, and for each application there was an independent determination of eligibility.

On October 23rd, the work-seeking requirements of §2607.1 (Appendix, at 82) were imposed for the first time inasmuch as Mr. Stone no longer had an AD application pending. Mr. Stone was advised that henceforth he would have to look for work 20 hours per week, and that he would not receive GA unless he did so. He was provided with the appropriate form and instructed to document his work-seeking efforts on that form. When he returned to reapply on October 29th, his form indicated that he had sought employment for 22 hours during the preceding seven days. He was found eligible on all grounds, granted assistance, and provided with a new form in the event he wisned to reapply again.

When he reapplied on November 5th, he was found eligible on all grounds except compliance with the work-seeking requirement.

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[3]By stipulation of the parties dated March 4, 1974, the action was dismissed with respect to Plaintiff St. Amour.

His form indicated that he had looked for work for only 4 hours. The case worker discussed the situation with Mr. Stone, and Mr. Stone explained that he was unable to meet the requirement because of bad weather and lack of transportation. Since these reasons for non-compliance were insufficient under regulation §2607, his application was denied without a prior hearing. Mr. Stone returned the following week, was found to be in compliance in all respects, and was granted assistance.

III. ARGUMENT

A. The single-judge District Court was without jurisdiction to rule on the merits of the case.

1. Introduction.

The appellant is of the belief that the Court, sitting as a single-judge District Court, lacked subject matter jurisdiction to decide the merits of the case. Because the case as originally filed and as maintained throughout the litigation presented all the elements necessary for convening a three-judge court, the Court should have requested such a tribunal, and should not have ruled on the merits. This is true even though only declaratory relief was afforded.

The fact that neither party applied for the convening of a three-judge court[4] is not dispositive since that type of court

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[4]Concerning the defendant it must be stated candidly that no application was presented by him because of oversight. Only when the decision was being reviewed to determine the possible bases for appeal, did the three-judge court issue first come to light. When counsel became aware of the issue, he immediately went back to the District Court and requested a reexamination of the case with

is required as a jurisdictional matter once the threshold prerequisites are met; in fact, the issue must be raised sua sponte on appeal if not dealt with below. See, e.g. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Noe v. True, 507 F. 2d 9 (6th Cir. 1974); Sardino v. Federal Reserve Bank of New York, 361 F. 2d 106, 113 (2d Cir. 1966). Moreover, as stated in Borden Co. v. Liddy, 309 F. 2d 871 (8th Cir. 1962):

> While no three-judge court was requested herein, it was nevertheless the duty of the District Judge, upon receiving an application for a restraining order and preliminary and final injunctions seeking to restrain enforcement and operation of the Iowa statute upon the ground of the unconstitutionality of such statute as it was attempted to be invoked, to himself initiate the necessary procedure for the setting up of a three-judge district court in accordance with 28 U.S.C. §2284. 309 F. 2d, at 876.

The relevant three-judge court statute, 28 U.S.C. §2281, reads as follows:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefore is heard and determined by a district court of three judges under section 2284 of this title.

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regard to this matter. (See defendant's motion, Appendix, at 78.) At the hearing on this motion, Judge Coffrin inquired as to why the issue was not raised sooner. After discussion, he was satisfied that the defendant had proceeded in good faith.

The purpose of the statute[5] was recently reiterated in Gonzalez v. Automatic Employees Credit Union, 42 L. Ed. 2d 249 (1974), as follows:

> Congress established the three-judge court apparatus for one reason: to save state and federal statutes from improvident doom, on constitutional grounds, at the hands of a single federal district judge. 42 L. Ed. 2d, at 259.

The statute, however, is not to be read "as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such. Phillips v. United States, 312 U.S. 246, 251 (1941).

Thus, certain strict requirements must be met before its provisions are invoked: the action must challenge a statute or regulation of statewide applicability, Board of Regents v. New Left Education Project, 404 U.S. 541 (1972); the constitutional basis for the challenge must not be insubstantial, Ex Parte Poresky, 290 U.S. 30 (1933), nor can the constitutional defense be frivolous, Bailey v. Patterson, 369 U.S. 31 (1962); and the plaintiff must seek injunctive relief, Kennedy v. Mendoza-Martinez, supra. See the exhaustive analysis in Sands v. Wainwright, 491 F. 2d 417 (5th Cir. 1973) (en banc).

The function of the district judge is limited to an inquiry to determine "whether the constitutional question raised is substantial, whether the complaint at least formally alleges a

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[5]The legislative history of the statute is detailed in Swift & Co. v. Wickham, 382 U.S. 111, 116-119 (1965). See also Currie, The Three Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1 (1964).

basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three judge statute." Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 (1930); Nieves v. Oswald, 477 F. 2d 1109, 1111-12 (2d Cir. 1973).

If all elements are met, the district judge is required to convene a three judge court, and may not decide the merits of the case. Fleming v. Nestor, 363 U.S. 603, 607 (1960); Idlewild, supra, at 15; Nieves, supra, at 1112.

2. The action challenges regulations of statewide applicability

While neither the complaint nor the Court's Order speaks in terms of a specific statute or regulation, denying prior evidentiary hearings to GA recipients is in fact pursuant to a duly promulgated regulatory scheme; it is a reflection of State policy.

The regulations governing the fair hearing procedure are set forth in the Vermont Welfare Administration Manual at §1250, et. seq. Under §1253 (Appendix, at 90), benefits shall be continued until a fair hearing decision is rendered only in cases of "termination or reduction of aid or benefits ..." In §2142.4 of the Welfare Assistance Manual (Appendix, at 79), it is stated that "General Assistance, a program to meet emergency needs, has no provision for ongoing assistance. Subsequent requests [for assistance] will be treated as new applications." Thus, there is no such thing as a "termination" or "reduction" in the GA context, only a denial. This being the case, there can be no continuation of GA benefits pending a hearing under §1253.

It might be argued, and has in fact been argued by the plaintiff, that the case is nothing more than an "executive action" rather than an attack on a statute or regulation[6]. Were this the case, then admittedly a three-judge court would not be required under the principle established in Ex parte Bransford, 310 U.S. 354 (1940); and Phillips v. United States, supra.

In support of his position, plaintiff cited two recent cases from this Court, Galvan v. Levine, 490 F. 2d 1255 (2d Cir. 1973); and Agur v. Wilson, 498 F. 2d 961 (2d Cir. 1974). In the former, plaintiffs challenged a policy of the Industrial Commissioner which denied employment compensation benefits to claimants who had moved from the area where they were last employed to an area of persistent high unemployment, which was defined as one with 12% or more unemployment. It was claimed that the 12% rule was applied discriminatorily because it affected only those persons who had moved to Puerto Rico.

The Court applied the Phillips - Bransford test which makes unnecessary the convening of a three-judge court where the challenge is not to a statute authorizing a state official to act, but rather to the official's exercise of his statutory powers.

In finding such a court not required, Judge Friendly said:

> Here the discriminatory application of the 12% rule was at several removes both from the statute and from the commissioner's general policy of denying benefits to persons who had moved to a labor market where there was no reasonable opportunity for employment. No legislative or administrative policy could be frustrated by a court's preventing the application of a reasonable

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[6]Plaintiff's Memorandum in Opposition to Defendant's Motion for Relief from Order, February 18, 1975, at 2-5.

> rule in an invidious manner, very likely not even known to the commissioner himself. 490 F. 2d, at 1259.

In the instant case, the denial of hearings prior to the denial of a GA application is not an unknown and unintended consequence several steps removed from the commissioner's general policy; rather, it is the very policy itself, well known to, and formulated by, the commissioner. And clearly, a declaration of unconstitutionality would frustrate this administrative policy. It would seem, therefore, that Galvan is inapposite.

Agur, supra, is even less on point. There, the court found that a three-judge court was not required because the constitutional claims were insubstantial inasmuch as state law had been construed to require the hearing the plaintiff desired. It was only in passing, and without any analysis, that the Court referred to the Phillips - Bransford - Galvan principle. Thus, this case must be read in terms of Galvan, which, as noted, is clearly distinguishable.

The instant case clearly seeks to "forestall the demands of some general state policy," Phillips, supra at 253, and therefore requires an enlarged tribunal. And in Sands v. Wainwright, supra, the very argument raised by plaintiff was specifically rejected. The Court said at 428:

> Plaintiffs claim that no particular paragraph or section of those Rules and Regulations ... is constitutionally offensive, and that no injunction is sought against any such paragraph or section. The entire thrust of plaintiffs' argument, however, is that the Rules and Regulations, as a whole and as applied, are constitutionally deficient standing alone. More complete and more specific regulations must be mandated in order to assure that the present "practices" will not be continued. [emphasis in original]

Moreover, these regulations are of statewide applicability. They were promulgated under the authority of 33 V.S.A. §2505(c)(2) and in accordance with Vermont's Administrative Procedure Act, 3 V.S.A. §801, et. seq, and,as mentioned, are contained in the Welfare Administration Manual and the Welfare Assistance Manual, respectively. Together, the two manuals govern statewide welfare operations. As stated in §1104 of the former:

> Social welfare programs administered by the department are in effect in every political subdivision of the state, except where limited to a specific geographic area by a pilot or demonstration project. Equitable standards of assistance, services and administration are in effect and mandatory throughout the state.

3. The Constitutional claim is arguably substantial, and the defense is far from frivolous.

Recently, the Supreme Court had occasion to discuss in depth the meaning of the substantiality doctrine with respect to three-judge courts. Hagans v. Levine, 39 L. Ed. 2d 577, 587-588 (1974). The Court quoted from Goosby v. Osser, 409 U.S. 512 (1973), in which it reiterated the principle of Ex parte Poresky, supra, that a constitutional claim is insubstantial only if

> ... its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy. 39 L. Ed 2d, at 588.

In Nieves v. Oswald, supra, this Court, after repeating the principle, said that

> Decisions of this court [Court of Appeals] binding as they are on district courts within this circuit whether they be of the single or three-judge variety, may also foreclose a constitutional challenge as insubstantial. 477 F. 2d, at 1112.

While the defendant strongly disagrees with the District Court's decision on the merits, it is at least arguable that the case meets the test of substantiality[7].

Concerning the defense to the action, the defendant submits that its position on the merits is far from frivolous, and hardly foreclosed by previous decisions. There is room for legitimate disagreement concerning the applicability of Goldberg v. Kelly, 397 U.S. 254 (1970), to Vermont's General Assistance program. The unique nature of the program, requiring week-to-week applications for assistance, distinguishes it from the ongoing welfare program in Goldberg. In fact, the District Court stated that, "In the case before us, the statutory and regulatory program considered by itself clearly reveals that General Assistance is not an ongoing program in the sense used in Goldberg." (Opinion, Appendix, at 73). It was only after reviewing statistical data that the Court found that certain recipients enjoy a "de facto continuation of benefits." (Appendix, at 75.) And it was only after making this finding that the Court determined Goldberg to be applicable. Thus, it would seem hard to argue that the defense was wholly without merit on its face. And without such an obvious defect, Bailey v. Patterson, supra, would not apply.

4. The complaint raises a basis for equitable relief.

With respect to the last requirement for invoking the three-judge court procedure, the complaint clearly raised a basis

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[7] Of course, if the claims are insubstantial, a dismissal is mandated. (See discussion of merits, infra, at 30).

for an injunction, and in fact specifically requested one. In determining whether this requirement is fulfilled, the Court need not look beyond the face of the complaint. Dale v. Hahn, 440 F. 2d 633, 640 (2d Cir. 1971), Nieves v. Oswald, supra, at 1112.

The Prayer for Relief in the original complaint, filed on behalf of Robert St. Amour, requested, inter alia, that the Court enter a declaratory judgment and "Issue a temporary restraining order, preliminary and permanent injunction restraining defendant from terminating, interrupting, or suspending General Assistance maintenance grants of plaintiff unless he is first given proper notice and an opportunity for a hearing ..." (Appendix, at 9). In the Intervenor's Complaint, filed on behalf of Joseph Stone, identical relief was requested (Appendix, at 12). The Court in fact granted a temporary restraining order.(Appendix, at 13). The prayer for injunctive relief has never been abandoned.

Thus, it must now be determined whether the continued request for injunctive relief, by itself, is sufficient to trigger the three-judge court procedure or whether the fact that the Court granted only declaratory relief provides an exception. The defendant believes that the request was sufficient.

A case often cited in this context is Kennedy v. Mendoza-Martinez, supra. While, broadly speaking, the case stands for the proposition that a single-judge court can declare a statute unconstitutional, the case is actually supportive of defendant's position. In that case, a single-judge district court declared unconstitutional certain sections of the Nationality Act of 1940 and the Immigration and Nationality Act of 1952, but granted no injunction. The Court found that a three-judge court was not required,

but only because, "In the complaint under which the case was tried the first and second time, Mendoza-Martinez asked for no injunctive relief, and none was granted." 372 U.S, at 153. With respect to an amended complaint which added a claim for injunctive relief, the Court said,

> However, it is abundantly clear from the amended trial stipulation which was entered into by the parties and approved by the judge to "govern the course of the trial," that the issues were framed so as not to contemplate any injunctive relief. Id.

Clearly, if injunctive relief had been contemplated, as in the instant matter, the case would have been a three-judge case. Steffel v. Thompson, 94 S. Ct. 1209, 1214 n.7 (1974).

There are also several Second Circuit cases on point. In Nieves v. Oswald, supra, this Court was faced with an appeal from the District Court's denial of an application for a three-judge court. The plaintiffs had sought both injunctive and declaratory relief. Following the appellate argument, plaintiffs moved to withdraw their request for an injunction. The Court said: "Obviously, if such a motion had been made and granted in the district court, the troublesome questions regarding jurisdiction of a single judge would not be before us." 477 F. 2d, at 1115. The Court also stated in a footnote to the above-quoted passage: "Had plaintiffs initially requested declaratory relief only, no three-judge court would have been required. Id., n.15.

The Court then went on to reject plaintiff's request to withdraw the prayer for an injunction, saying:

> If [the request to withdraw the prayer is] renewed and granted at that time [on remand], plaintiffs should seek entry of a fresh decree declaratory in form only, from which a timely appeal can again be

> taken. [footnote omitted]. Should plaintiffs elect to stand on their prayer for injunctive relief, a three-judge court is required for adjudication of the claims. 477 F. 2d, at 1116.

In New York State Waterways Association v. Diamond, 469 F. 2d 419 (2d Cir. 1972), the District Court had refused plaintiff's request for the convening of a three-judge court. The Court of Appeals reversed the District Court's dismissal of the action and remanded the case for the convening of a three-judge court. In so doing, the Court said:

> Given the jurisdictional basis for the suit, and the fact that plaintiffs clearly seek injunctive relief against the enforcement of a state statute on the grounds of unconstitutionality, a 28 U.S.C. §2281 three-judge district court is mandated if the constitutional attack is not insubstantial. 469 F. 2d, at 421.

In Seergy v. Kings County Republican County Committee, 459 F. 2d 308 (2d Cir. 1972), the Court affirmed the District Court's declaratory judgment of unconstitutionality of a state statute, but only after finding that the request for injunctive relief had been dropped.

> Although the complaint here requested injunctive relief in addition to declaratory relief, the plaintiffs appear to have abandoned their prayer for an injunction before any proceedings had been begun, and thereafter to have sought only a declaratory judgment, which would not require the convening of a three-judge court [citations omitted] even though the complaint as originally drawn had sought injunctive relief. 459 F. 2d, at 312.

Rosario v. Rockefller, 458 F. 2d 649 (2d Cir. 1972) aff'd 410 U.S. 752 (1973), is also on point. There, the plaintiff's request for an injunction was dropped, and the Court granted only declaratory relief. The Court of Appeals suggested that a three-judge court would have been necessary had the plaintiffs continued to press for an injunction. 458 F. 2d, at 651 n. 2.

See also Lecci v. Cahn, 493 F. 2d 826, 830 n.6 (2nd Cir. 1974).

The law in other Circuits is to the same effect. A case particularly on point is Americans United for Separation of Church and State v. Paire, 475 F. 2d 462 (1st Cir. 1973). There, plaintiffs challenged a so-called "dual enrollment" agreement between a parochial school and a public school district. The agreement had been drawn in compliance with state regulations. The plaintiffs sought both injunctive and declaratory relief, although neither party requested a three-judge court. The District Court granted only declaratory relief, as did the lower court in the instant case, and reserved judgment with respect to an injunction.

The Court of Appeals, in holding that the single-judge court was without jurisdiction, vacated the judgment and remanded the case, saying:

> While the plaintiffs waived their request for preliminary injunctive relief, they have not waived their request for permanent injunctive relief against both the Nashua program and other similar ones... 475 F. 2d, at 464-465.

See also Noe v. True, supra, at 12; Redfern v. Delaware Republican State Committee, 502 F. 2d 1123, 1128 (3rd Cir. 1974); Whatley v. Clark, 482 F. 2d 1230, 1231 and n.3 (5th Cir. 1973); Triple A. Realty, Inc. v. Florida Real Estate Commission, 468 F. 2d 245, 247 (5th Cir. 1972); Jeanette Rankin Brigade v. Chief of Capitol Police, 421 F. 2d 1090, 1093-95 (D.C. Cir. 1969).

B. The judgment should be vacated and the case remanded for the convening of a three-judge court.

Assuming that the defendant is correct in his opinion that a three-judge court should have been convened, the question remains as to the proper course for this Court to follow. In this regard, the defendant is of the view that the judgment must be vacated and the case remanded for the convening of such a court. He takes this position in full recognition of the fact that it will not be greeted with unbridled enthusiasm. Nevertheless, in the context of this case, the defendant believes that the Court has no option.

The Supreme Court, on several occasions, has stated that an appellate court is precluded from reaching the merits of a case that should have been heard by a three-judge court.

In Stratton v. St. Louis S. W. Ry., 282 U.S. 10 (1930), the Court, in holding that the Court of Appeals was without jurisdiction to hear an appeal from a decision of a single judge when a three-judge court was required, declared:

> Nor does an appeal lie to the Circuit Court of Appeals from an order or decree thus entered by a District Judge without authority, for to sustain a review upon such an appeal would defeat the purpose of the statute by substituting a decree by a single judge and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this Court. 282 U.S., at 16.

The Court went on to say:

> Accordingly, where a court of three judges should have been convened, and was not, this Court may issue a writ of mandamas to vacate the order or decree entered by the District Judge and directing him, or such other judge as may entertain the proceeding, to call to his aid two other judges for the hearing and

determination of the application for an interlocutory injunction. Id.

In Fleming v. Nestor, 363 U.S. 603 (1960), the Court said:

> If the [three-judge court] provision applies, we cannot reach the merits, but must vacate the judgment below and remand the case for consideration by a three-judge District Court. 363 U.S., at 607.

In Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962), the Court had an opportunity to review the Stratton case. In the District Court, plaintiff's request for a three-judge court had been denied. The Court of Appeals, following Stratton, held that, even though a three-judge court should have been convened, it was powerless to take corrective action, and dismissed the appeal.

The Supreme Court, in holding that Stratton did not render the Court of Appeals powerless to order the proper convening of a three-judge court[8], nevertheless reaffirmed a basic proposition of that case: that "... a court of appeals was precluded from reviewing the merits of a case which should have originally been determined by a court of three judges." 370 U.S., at 715-16.

With these guiding principles in mind, it would be appropriate to look at the opinions of this Court which are closest on point. While the defendant has been unable to find any authorities which are on all fours, those that are relevant confirm that this Court, for the most part, will play only the limited

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[8] See Currie, Appellate Review of the Decision Whether or Not to Empanel a Three-Judge Federal Court, 37 U. Chi. L. Rev. 159 (1969).

role carved out by the Supreme Court in reviewing challenges to the authority of a single judge. In each of the cases cited below, unlike the instant case, the Court simply was faced with an appeal by the plaintiff after his request for a three-judge court had been denied. (Here, of course, the appeal is by the defendant after a state regulatory scheme has been declared unconstitutional; and no request for a three-judge court was made below.) The denial by the single judge was almost exclusively based on the grounds that the constitutional questions were insubstantial. And in nearly all cases, this Court has gone no further than to review the substantiality question, pursuant to the Idlewild doctrine, without passing upon the merits. If this traditionally narrow standard of review is applied here, the decision should be reversed and the case remanded.

From these cases, two lines of decisions have emerged. In one line, this Court has disagreed with the lower court's denial of the application for a three-judge court, and has reversed and remanded for the convening of such a court. In the other, the lower court's denial has been affirmed.

The following cases represent the first line:

In Kramer v. Union Free School District No. 15, 379 F. 2d 491 (2d Cir. 1967), the plaintiff challenged the constitutionality of a New York statute which established qualifications for voting at school district meetings. He requested the convening of a three-judge court, which was denied on the ground of constitutional insubstantiality. Judge Hays found that the claim was sufficiently substantial to require such a court. The lower

court's decision was then reversed and the case remanded. He was careful to point out, however, (379 F. 2d, at 494) as was Judge Kaufman in a concurring opinion, (Id., at 495) that the Court's action was not meant to be an expression on the merits of plaintiff's claim.

In Gold v. Lomenzo, 425 F. 2d 959 (2d Cir. 1970), the District Court had denied for reasons of insubstantiality a motion for the convening of a three-judge court in an action in which plaintiff sought to enjoin on constitutional grounds an order of the New York Secretary of State which suspended his real estate broker license because, among other things, he had charged excessive commissions. He alleged that the level of commissions prescribed by the Secretary was confiscatory.

Judge Friendly found that such allegations presented a sufficiently substantial constitutional issue. Accordingly, he reversed the lower court's order and remanded the case. In taking this action, he spoke of the limited role which could be played by the appellate court. He stated that the applicable Supreme Court cases

> [a]ppear to be continuing the drift to the position that if a court of appeals does not exactly have jurisdiction of an appeal such as this, it has something sufficiently similar to enable it to reverse for the convening of a three-judge court. [citing Idlewild] . 425 F. 2d, at 961.

A similar result was reached in Abele v. Markle, 452 F. 2d 1121 (2d Cir. 1971). In that case, the constitutionality of Connecticut's anti-abortion statutes was challenged. The District Court refused to convene a three-judge court and dismissed the complaint on grounds that the plaintiffs lacked standing, and that

abstention was mandated. Judge Mansfield, however, concluded that certain plaintiffs did have standing, and that only a three-judge court could rule on the abstention question.

In New York State Waterways Association, Inc. v. Diamond, 469 F. 2d 419 (2d Cir. 1972), this Court, per Judge Smith, found, contrary to the District Court, that the constitutional challenge to certain anti-pollution statutes was adequately substantial to warrant a three-judge court. Thus, the judgment below was reversed, and the case remanded.

In Nieves v. Oswald, 477 F. 2d 1109 (2d Cir. 1972), which in defendant's view is the most significant case in this area, the District Court once again refused to convene a three-judge court because of a belief that the constitutional issues were insubstantial. The action involved prisoner's challenges to disciplinary proceedings arising out of the Attica revolt.

This Court, in an opinion by Judge Feinberg, found that the questions were substantial, and remanded the case. In so doing, it was stated that,

> Because we believe that Judge Henderson improperly refused to convene a three-judge court, we do not reach the various contentions of the parties on the merits ... 477 F. 2d, at 1111.

See also Rosenthal v. Board of Education, 497 F. 2d 726, 730 (2d Cir. 1974).

Thus, it would seem from these cases that if the Court finds the questions substantial it should reverse the judgment and remand the case for the convening of a three-judge court, without ruling on the merits.

In the second line of cases, this Court has affirmed the District Court's denial of the application for a three-judge Court. In each of these cases, however, with certain exceptions, the Court has applied the same standard of review and has gone no further than to rule on substantiality.

For example, in Sardino v. Federal Reserve Board of New York, 361 F. 2d 106 (2d Cir. 1966), the plaintiff challenged the constitutionality of certain federal regulations which prohibited transfers outside of the United States of property owned by Cuban nationals. This Court found that all but one challenge were insubstantial, and that the remaining challenge did not fall within the provisions of 28 U.S.C. §2282.

In affirming the judgment, Judge Friendly addressed himself to the three-judge court issue, and questioned whether it should ever be necessary to start over again by requiring the convening of a three-judge court[9]. 361 F. 2d, at 114.

In the context of the case, however, his statement seems to go no further than to say that a three-judge court should not be required to rule on the threshold questions of substantiality

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[9] "It seems indeed passing strange that a statute intended to protect the Government against invalidation of an Act of Congress by a district judge without the assistance of two other judges, one of whom shall be a circuit judge, could be read as requiring a fresh start in a case where no one has invoked the procedure thus afforded, only questions of law were presented, the district judge validated the challenged legislation, and three circuit judges had come to the same conclusion before the point was noticed. Indeed, if the case required, we would be disposed to reexamine whether despite intimations by the Supreme Court, ... so bizarre a result was truly demanded."

or questions of the statute's applicability; these are properly within the province of a single judge.

In Green v. Board of Elections of the City of New York, 380 F. 2d 445 (2d Cir. 1967), the plaintiff attacked on constitutional grounds the statutes which denied convicted felons the franchise. His request for the convening of a three-judge court was denied, and the District Court dismissed the complaint. This Court, per Judge Friendly, affirmed the decision.

In his opinion, the Judge suggested that the appellate court was limited to a review of the substantiality issue. He said:

> It is common ground, as we recently reaffirmed in Utica Mutual Ins. Co. v. Vincent, 375 F. 2d 129, 130 (2 Cir. 1967) citing many cases that "When a complaint for an injunction makes a claim of unconstitutionality which on its face would require a court of three judges ..., the single district judge should consider whether the claim is substantial and if he finds it is not, refuse to convoke a court of three judges and dismiss the action." It is also common ground that such a decision by a district judge is reviewable in the court of appeals ... 380 F. 2d, at 448.

In Russell v. Hodges, 470 F. 2d 212 (2d Cir. 1972), the appellate panel also agreed with the lower court's decision refusing to convene such a court, and affirmed. Judge Friendly again rejected the argument that questions regarding substantiality must be heard by a three-judge court. 470 F. 2d, at 219-220.

See also Pordum v. Board of Regents, 491 F. 2d 1281, 1286 (2d Cir. 1974).

There are cases, however, which appear to present exceptions in that a three-judge court was not ordered to be convened even though the questions were determined to be substantial. In

Dale v. Hahn, 440 F. 2d 633 (2d Cir. 1971), the plaintiff challenged the constitutionality of a New York statute, pursuant to which she had been declared incompetent and had had a committee appointed to handle her affairs. She requested declaratory relief and an injunction against the enforcement of the statute and against any action by the existing committees. The complaint was dismissed, and plaintiff's motion for a three-judge court was denied.

On appeal, Judge Waterman reversed the dismissal, finding that the constitutional claim was substantial. He specifically did not address the merits, however. 440 F. 2d, at 638. On the three-judge court issue, despite the finding of substantiality, he determined that such a court would not be required. The basis for this decision, however, was simply that the plaintiff no longer had standing to obtain injunctive relief inasmuch as a final accounting had been approved and the committee discharged. While this decision presents an exception to the usual procedure, it arose out of a unique factual circumstance in which the request for an injunction had become moot. No general rule should emerge from this case.

For other cases involving unique factual circumstances, in which this Court found that no three-judge court was required despite substantial claims, see Jordan v. Fusari, 496 F. 2d 646, 648 n. 2 (2d Cir. 1974); and Lewis v. Rockefeller, 431 F. 2d 368, 371 (2d Cir. 1970).

In Astro Cinema Corp. v. Mackell, 422 F. 2d 293 (2d Cir. (1970),it was determined that, even though the constitutional objections were not clearly insubstantial, the Court would not reverse the lower court's refusal to convene a three-judge court.

Yet in this case there appear to be no unique facts making it unnecessary to call for a three-judge court. Rather, the Court seems to have based its decision on practicalities.

Judge Kaufman said:

> While the application did raise constitutional objections that could not be described as clearly insubstantial, though they did not convince either us or the District Court, nonetheless, we do not reverse on this point, for we believe that to do so would be futile. There must be a demand for injunctive relief to bring §2281 into play. [citations omitted]. Here there was a demand for injunctive relief joined with one for the return of the film. While we have directed the film to be returned (and suggested means for making it available at trial) the injunction, the substance of the requirement for application of §2281, has not been granted; and as in Green v. Board of Elections of the City of New York, 380 F. 2d 445, 449 (2d Cir. 1967), cert. denied, 389 U.S. 1048, 88 S. Ct. 768, 19 L. Ed. 2d 840 (1968), we see little point in reversing denial of the three-judge court application when to do so could lead only to dismissal by two district judges and one appellate judge instead of three appellate judges. 422 F. 2d, at 298.

In commenting on this approach, Judge Feinberg, in Nieves v. Oswald, supra, said:

> A few further observations seem appropriate. We recognize that the three-judge court statutes are technical enactments, to be restrictively construed. Phillips v. United States, supra, 312 U.S. at 251, 61 S. Ct. 480. In this spirit, we have previously declined to reverse decisions of single district judges, even where sections 2281 or 2282 might literally apply, when we unhesitatingly agreed with the resolution of the merits of a case by the court below, and where convening a statutory district court seemed therefore a patently wasteful formality. [citing Sardino, supra, Astro Cinema, supra, and Green, supra[10]] 477 F. 2d, at 1115.

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[10] The defendant submits that only Astro Cinema actually supports the proposition stated. In Sardino and Green, the Court simply affirmed the lower court's finding of insubstantiality, while as mentioned previously, the Astro court affirmed after a finding that the questions were not insubstantial. This appears to be a significant distinction.

From the ruling in Astro Cinema and this statement in Nieves, it might be argued that this Court should go beyond the narrow issue of whether a three-judge court should have been convened, and rule on the merits of the case; even though §2281 "might literally apply," this Court should affirm Judge Coffrin's declaratory ruling if it is in solid agreement.

Such an argument, however, assumes too much. In Astro Cinema, the lower court had not found the statues to be unconstitutional. Rather, it had merely refused to convene a three-judge court because of an insubstantial constitutional claim. And of course it was the plaintiff who appealed. Thus, the purpose of §2281--to protect state statutes from improvident doom at the hands of a single judge--was not in issue.

In the instant case, however, a state regulatory scheme has been found unconstitutional, and it is the state, for whose protection the three-judge court procedure was enacted, that is pressing the issue.

In fact, Judge Kaufman, in Astro Cinema, pointed out this important distinction. After discussing the futility of reversing the denial of the plaintiff's application for a three-judge court, he said:

> This [futility] is particularly so when the aim of §2281 was to protect the States against declarations of unconstitutionality emanating from a single district judge. While it is true that plaintiff loses his direct appeal to the Supreme Court, not only is that body capable of remedying any injustice through the device of certiorari, but the direct appeal provision, in context, seems far more likely to have been for the benefit of the state than the plaintiff. 422 F. 2d, at 298.

And in Nieves, supra, Judge Feinberg continued:

> We also agree with those who note the anomaly of requiring three judges to decide a case in which, as here, the state, for whose protection statutory courts were originally devised, is content to litigate the case before a single federal judge. 477 F. 2d, at 1115.

The Judge then went on to state a key proposition, which seems to narrow significantly the effect of Astro Cinema:

> Nevertheless, though adherence to the letter of section 2281 (and judicial gloss thereon) may appear unduly formalized, and though it regretably adds to the growing Supreme Court caseload, it may also forestall further delay that resuls from ultimately meaningless efforts, following disposition by a court of appeals, to obtain Supreme Court review: The Court apparently will consider, on its own motion, whether three judges were initially required, and, if so, the entire litigation must commence anew before a court of three judges. Thus, in appropriate cases, we have not hesitated to reverse a single judge disposition with instructions to convene a three-judge court. [citations omitted]. Id.

The defendant reads this statement to say, Astro Cinema notwithstanding, that the better course is to convene a three-judge court. See Oakes, Second Circuit Note 1972 Term, Forward: The Three-Judge Court and Direct Appeals to the Second Circuit, 48 St. Johns L. Rev. 205, 210 (1973).

While to the best of the defendant's knowledge the above-mentioned cases are closest on point in this Circuit, a nearly identical situation was treated recently in the First Circuit. In Americans United for Separation of Church and State v. Paire, 475 F. 2d 462 (1st Cir. 1973) the plaintiff sought both declaratory and injunctive relief with respect to a "dual enrolement" agreement between a parochial school and a public school district, although neither party requested the convening of a three-judge court. The single judge District Court declared the agreement unconstitutional, but issued no injunction. After determining that the agreement was

based on a specific statewide policy founded on statute and regulations, the Court determined that it was a proper three-judge court case. The Court stated:

> We conclude that the district court, consisting of a single judge, was without jurisdiction to hear and resolve the issue before it. Since it was without jurisdiction, we are without jurisdiction to resolve the substantive issues on appeal. The judgment of the district court is vacated, and the case remanded for reference to a district court of three judges. 475 F. 2d,at 466.

And in Sands v. Wainwright, 491 F. 2d 417 (5th Cir. 1973), the Court stated:

> Prehaps most significant in the rapid expansion in the number of the three-judge courts is the interpretation of §2281 as a jurisdictional statute. An appellate court must, on its own motion. remand a case for trial by a three-judge court if it believes that a single judge should not have heard the case. 491 F. 2d,at 424.

See also Borden Co. v. Liddy, 309 F. 2d 871, 877 (1962).

C. Due process does not require a pre-termination hearing in the context of Vermont's General Assistance program.

In the event that this Court wishes to review the substantiality of the plaintiff's claim, or actually to rule on the merits, it is the defendant's position that due process does not require a pre-termination hearing in this case.

Goldberg v. Kelly, 397 U.S. 254 (1970), held that the Fourteenth Amendment requires an adequate hearing before certain ongoing welfare benefits may be terminated. The decision was based upon the principle that once an individual is declared eligible to receive such benefits under applicable statutes, the continued receipt thereof becomes an "entitlement" or a property interest

protected by the Due Process Clause. Goldberg, supra, at 262 n. 8.

It is defendant's belief that the Goldberg requirements are inapplicable in the present situation because of a fundamental factual difference between the welfare program under scrutiny in that case, and the one in question here. In Goldberg, the welfare programs were maintenance programs, clearly "on-going" in nature. The plaintiffs in that case had been receiving welfare benefits on a regular basis due to an initial determination of continuing eligibility. This created the entitlement.

The General Assistance program is not a maintenance program, however, It is designed to meet emergencies on a limited basis. Thus, Joseph Stone never receive assistance because of a determination of continuing eligibility. Eligibility was re-determined each and every week during the entire period. On November 5, 1973, his benefits were not terminated; rather his application was denied.

This contention, of course, goes to the heart of the issue. If there was no entitlement, then presumably there was no protected interest for due process purposes. If, on the other hand, there was an entitlement, then Goldberg controls. Therefore, the question is whether or not an entitlement existed. The answer can be found in large part in Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U. S. 593 (1972).

Roth involved an individual who had been hired as a university professor for a fixed term of one academic year. This term was specified in his notice of appointment to the faculty. He

was not rehired for the ensuing year. For any non-tenured teacher, such as the respondent, applicable statutes made no provision for a statement of reasons or a hearing with respect to the university's decision not to rehire. Roth challenged this procedure, in part, on the grounds that he had been denied procedural due process.

In its decision, wherein it was held that due process did not require that Roth be given such a statement and a hearing, the Court specified the types of interests protected by procedural due process. Only "liberty"[11] and "property" are so-protected. Roth, supra, at 569.

In describing the nature of a protected property interest, the Court in Roth stated at 576:

> The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests--property interests--may take many forms. Thus, the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. [citing Goldberg] [emphasis added]

Thus, the question becomes: Were the General Assistance benefits "already acquired" in the Goldberg sense? Defendant

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[11] While plaintiff asserts that he was deprived of "liberty," (Plaintiff Stone's memorandum in support of his motion for summary judgment, February 25, 1974, at 8.) the essence of his case is that he had an entitlement to property. In order for liberty to be in issue, there would have to have been factual allegations to the effect that his reputation or standing in the community were seriously damaged, or that a stigma attached because of the defendant's actions. Roth, at 573. There are no such allegations, and the point does not seem to be pressed strongly. Moreover, the District Court concentrated on the property aspects of the claim. For these reasons, the defendant will treat the case as involving only the property question.

asserts that they were not. As the Court said in Roth, at 577:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

And continuing at 578:

> Just as the welfare recipients' "property" interest in welfare payments was created and defined by statutory terms, so the respondent's "property" interest in employment at Wisconsin State University-Oshkosh was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30, 1969. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever.
>
> Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment. [emphasis in original text]

From the foregoing analysis, it is clear that, at a minimum, there must be an objective standard, such as a "rule or policy," to create an entitlement. A subjective "abstract concern" is insufficient to give rise to a protected property interest.

This concept is further developed in Perry v. Sindermann, 408 U.S. 593 (1972). There, the respondent had been employed as a non-tenured teacher in three institutions within the state college system for a period of ten years, from 1959 to 1969. At the time

of the action, he had been teaching for four years at the third institution on the basis of one-year contracts. In the Spring of 1969, his contract expired, and he was not rehired. He challenged the action of the Board of Regents on two grounds, one of which was the Board's failure to provide him with procedural due process, namely an opportunity for a hearing.

The respondent had alleged, and had offered to prove, that the policies of the institution created a de facto tenure program in that teachers were led to believe through the college's faculty guide that they would be rehired so long as they performed satisfactorily, were cooperative, and liked their work. The District Court granted summary judgment for the Board of Regents.

In reversing, the Court of Appeals held that Perry's right to due process would be violated if he could show a subjective "expectancy" of re-employment. Sindermann v. Perry, 430 F. 2d 939 (1970).

The Supreme Court again looked at the interests being affected, and decided that the respondent's allegations concerning de facto tenure did raise a question as to a legitimate property interest in continued employment.

The Court stated at 601:

> A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

In discussing the "rules" or "understandings", the Court referred to the concept of implied contracts, where words or actions of the promisor might give rise to a legally cognizable agreement.

Thus,

> A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service - and from other relevant facts - that he has a legitimate claim of entitlement to job tenure. 408 U.S., at 602.

The Court found that "In this case, the respondent has alleged the existence of rules and understandings promulgated and fostered by state officials that may justify his claim of entitlement ..." Id. The Court then affirmed the judgment, remanding the case so that Perry could have an opportunity to prove his allegations. In so doing, however, the Court specifically rejected the subjective expectancy rationale by stating: "We disagree with the Court of Appeals insofar as it held that a mere subjective 'expectancy' is protected by procedural due process ..." Id.

On the basis then of Roth and Perry, it becomes clear that a protected property interest does not exist merely because of a "subjective expectancy" or an "abstract concern" for benefits. Rather, it must be based on objective facts such as statutes, rules or mutual understandings. See Schwartz v. Thompson, 497 F. 2d 430, 433 (2d Cir. 1974); Wahba v. New York University, 492 F. 2d 96, 98 n.2 (2d Cir. 1974); and Russell v. Hodges, supra, 470 F. 2d, at 216.

Were there such objective facts to support Joseph Stone's claim of entitlement? Clearly, there were not. The Department of Social Welfare in fact does everything possible, short of prohibiting successive applications, to make it known to recipients that the program is limited. The existing rules or understandings of the GA program, while they do stem from an "independent source such as a state law," Roth, supra, specifically provide that benefits shall not be continuing. Moreover, the whole application procedure is

designed to point out to applicants and re-applicants that the receipt of benefits is not to be considered as continuous and automatic. If there were rules or understandings to the contrary it would be absurd for the Department to continue to require this procedure. And significantly, the plaintiff does not even allege the existence of such rules or understandings. This in itself should be sufficient to remove the case from the Perry framework. See Russell v. Hodges, supra, 470 F. 2d, at 216-217.

Nor does the District Court point to any rules or understandings to support its decision. In fact,

> By limiting our frame of reference solely to the statute and regulations before us, it appears that by virtue of the requirement of week to week applications with a fresh determination of eligibility, an applicant for General Assistance has no present interest in specific benefits and thus the "entitlement" necessary for due process safeguards does not attach. (Opinion, Appendix, at 60.)

The Court nevertheless found a de facto on-going program of welfare. This finding, however, was based solely on the fact that the plaintiff was a continuous recipient, and nothing more; the "lengthy and constant grant of benefits" (Opinion, Appendix, at 60) was considered enough, in and of itself, to trigger a pre-termination hearing. This reasoning must be rejected. If the District Court were correctly stating the law, there would have been no need in Perry to remand the case, for there was no question that Ferry had been continuously employed for 10 years. Yet the continuous employment, by itself, was clearly insufficient to create an entitlement. At most, such employment created a subjective expectancy.

Plaintiff has also raised the point that without the receipt of GA he is placed in a desparate condition, and that this factor outweighs any competing governmental interest. He asserts that this balancing test is an independent consideration. While defendant agrees that the ultimate result is relevant when a protected interest is affected, this "brutal need" argument does not even come into play until the individual has in fact established such an interest.

As the Supreme Court also stated in Roth, at 570-71:

> And a weighing process has long been a part of any determination of the form of hearing required in particular situations by procedural due process. [footnote omitted]. But to determine whether due process requirements apply in the first place, we must look not to the weight but to the nature of the interest at stake [emphasis in original text]. See Morrissey v. Brewer, 408 U.S. 471, at 481, 33 L.Ed. 2d 484, at 494, 92 S. Ct. 2593. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

Thus, only after it is determined that due process applies does the balancing test become relevant. And, as demonstrated, due process does not apply here.

In the event that the foregoing discussion is not entirely persuasive, any doubts should be resolved by the recent case of Arnett v. Kennedy, 94 S. Ct. 1633 (1974). The defendant is of the opinion that on the basis of Arnett, this case requires a reversal, even if it is determined that the plaintiff had a statutory entitlement to benefits.

In Arnett, Mr. Justice Rehnquist, writing for himself and two other Justices, found that the appellee, a non-probationary employee in the competitive federal Civil Service, had a statutory right not to be removed from his job except for "cause." Yet,

the plurality rejected his argument that he was entitled to a pre-dismissal hearing. The statute that created the right also established the dismissal procedure, and no provision was made for a pre-dismissal hearing in that statute. The Court found that he could not have the right without the procedural limitations attached to it.

While noting that "This doctrine has unquestionably been applied unevenly in the past, and observed as often as not in the breach," the Court went on to say:

> We believe that at the very least it gives added weight to our conclusion that where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet. 94 S. Ct., at 1644.

In the instant case, the availability of General Assistance is provided by statutes and implementing regulations. The regulations also provide that there shall be no pre-termination hearings. Thus, if the plaintiff chooses to accept the substantive right to public assistance, he should also be required to accept the inherent procedural limitations.

It should be emphasized, however, that applicants for General Assistance are provided an opportunity for a hearing after a denial. Even if a property right is found and the Arnett analysis is rejected, this hearing procedure should be adequate for due process purposes. This is so especially because of the fact that an applicant can reapply at any time; a denial one day has no bearing on future eligibility. For example, if an individual fails to qualify because he did not seek work for the required 20 hours,

he can return at any time the standard is met (In fact, Joseph Stone was granted assistance the following week after his denial on November 5th.) Or, if an application is rejected because the individual's income during the preceding 30 days is over the applicable standard, he may re-apply at anytime, even the following day, if his income falls below the established level.

These situations are considerably different from those that arise in the federal-state categorical programs, where eligibility is not likely to change from day to day. A termination from the AFDC program most likely precludes the receipt of benefits for a much longer period of time. This being the case, the hearing requirements of that program should not be imposed upon the General Assistance program.

In addition to the legal objections to the District Court's decision, the defendant would also like to point to some very practical problems which would be created by the Court's ruling.

As mentioned, under that ruling,if an individual receives benefits on three or more occasions during a 30 day period, he must be provided with an opportunity for a hearing before benefits can be denied. In other words, benefits must continue until the factual questions are resolved at a fair hearing.

Suppose that an individual applies for and receives $10.50 for food during three successive weeks, and on his fourth application requests $150 for an overdue utility bill and $75 for winter clothes. Suppose further that the Department learns, perhaps from the applicant himself, that during the fourth week he

received income which brought him above the applicable need standard, and the application is therefore denied. If the individual requests a hearing, what benefits continue? Does due process require that the Department provide the applicant with $225? If the individual returns on successive weeks with new requests, does due process require that these be granted until such time as a hearing is held?[12] And what could possibly be accomplished by a hearing? The individual would already have received everything he requested, and there would be no reason to seek an adjudication of his rights. Yet it is not inconceivable that every applicant would request a hearing once it is learned that benefits continue. It should also be pointed out that even if the Department were to prevail at the hearing, there would be no chance of recouping the money expended. Thus, people who may have a far greater need could be forced to go without because of the very limited GA appropriation.

In effect, the lower court's decision mandates a maintenance program in Vermont, even though this is directly contrary to statutory and regulatory intent. It strikes the defendant as astounding that the constitution could force such a result.

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[12] Even in Vermont, it takes 38 days, on the average, before such hearings are held. (Affidavit of William Griffin, Appendix at 53).

IV CONCLUSION

For the foregoing reasons, the defendant-appellant requests that this Court vacate the judgment and remand the case for the convening of a three-judge court. Alternatively, it is urged that the constitutional claims be declared insubstantial, or that the judgment be reversed on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served two copies of defendant-appellant's brief and one copy of the appendix on Stephen W. Kimbell, counsel for plaintiff-appellee, by mailing same, first class postage prepaid, to his business address, Vermont Legal Aid, Inc., Box 562, Burlington, Vermont, on April 21, 1975.

DEFENDANT-APPELLEE